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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1970

No. 1751

ROSE LOWE MILLER,

Petitioner,

vs.

MAGGIE P. SPEIGHT,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Respondent, Mrs. Maggie P. Speight, by Alan E. Morrill and William J. Harbison, her attorneys, respectfully submits that the petition for certiorari filed herein is without merit and that the petition should be denied. No substantial federal question is presented nor are any of the other considerations set forth in Rule 19 of the Rules of this Court present. The case involves only the construction and interpretation of certain Tennessee statutes dealing with the period of limitation for filing personal injury suits.

STATUTES INVOLVED.

The applicable statutes are correctly quoted in the petition for certiorari, pages 3 and 4. It should be noted that

the savings statutes, Tennessee Code Annotated, Sections 28-105 and 28-106 are an integral portion of the Tennessee Code dealing with statutes of limitations in general.

STATEMENT OF THE CASE

There is no dispute as to the facts of the case, which are correctly stated in the opinion of the Court of Appeals for the Seventh Circuit, 437 F.2d 781. Respondent brought suit in the Tennessee state courts against the defendant on October 16, 1968, claiming damages for personal injuries and property damage arising out of an accident which occurred in Nashville, Tennessee, on November 4, 1967. The suit was, therefore, clearly begun within the one-year statute of limitations provided by the Tennessee code for personal injury actions, T.C.A. 28-304. (The state allows three years for filing property damage claims, T.C.A. 28-305)

In the interim between the date of the accident and the filing of suit, the defendant had left Tennessee and had moved to Chicago, although this information was not known to the plaintiff or her counsel at the time of filing suit in Tennessee. The original summons was, therefore, returned by the Tennessee deputy sheriff unserved, and respondent then sought to obtain service upon the petitioner through the Tennessee Nonresident Motorist Statute, T.C.A. 20-224, by having alias process issued through the Secretary of State of Tennessee. This service was held ineffective, however, because the alias summons was issued more than one year after the date of the accident. See *Speight* v. *Miller*, 443 S.W.2d 657 (Tenn. 1969).

After service of process was held ineffectual in Tennessee, not because of the statute of limitations but because of the lapse of a one-year agency period for the Secretary of State, as then provided by Tennessee statutes, respondent

filed the present suit in the United States District Court for the Northern District of Illinois on March 17, 1969. This was more than one year after date of the original accident, but only a few months after the return of the original process in Tennessee unserved. Two Tennessee statutes provide an additional one-year period for the continued prosecution or refiling of suits which have been originally brought within an applicable period of limitations, where the original summons could not be served or where the original suit was dismissed for any reason not concluding the merits of the case. Tennessee Code Annotated, Sections 28-105, 28-106.

The statute of limitations governing personal injury actions in Illinois is two years, so that the filing of the suit in the U. S. District Court in Illinois did not in any way offend or violate the Illinois statute of limitations. Like many states, Illinois has a borrowing statute which does not permit the filing of suits in Illinois where the suits would be barred in the state of origin. The District Court, pursuant to petitioner's motion to dismiss, held that the present suit filed by respondent in Illinois was barred under the Illinois borrowing statute, but the Court of Appeals for the Seventh Circuit reversed this holding and held the present action timely filed in Illinois. The Court of Appeals carefully and thoroughly considered the Tennessee savings statutes above referred to, and held that the present suit would not have been barred had it been filed in Tennessee on March 17, 1969; it therefore was not barred when filed in the federal court in Illinois.

It should be stated that insofar as the original suit brought in Tennessee sought property damage, the Tennessee courts held this aspect of the suit to be timely filed under the Tennessee statutes, and that portion of the case

is still pending in Tennessee. Counsel for respondent have represented to the courts below and represent to this Court, however, that that aspect of the case will be dismissed and not pursued in Tennessee, since it is also embraced in the Illinois suit. Respondent has no desire or wish to fragment the litigation, and will not force petitioner to litigate in two different courts. Respondent does insist, however, that she is entitled to a trial of her case on the merits and that she has exercised all possible diligence to locate the petitioner and obtain effective service of process upon her, so that she may have a trial both of the personal injury and property damage claims upon their merits.

ARGUMENT

As stated at the outset, this case involves nothing more than the correct application and interpretation of statutes of the State of Tennessee. The operation of the Illinois borrowing statute depends upon the application of the Tennessee statutes of limitations, because the Illinois borrowing statute forbids the prosecution of the present suit in Illinois only if the suit would have been barred had it been brought in a Tennessee state court. As pointed out previously, there is nothing in the local law of Illinois which is offended in any way by the present suit. The suit was brought within less than two years following the date of the accident, so that local statutes of limitations of Illinois do not bar the action.

There is no question of the interpretation or application of an Act of Congress or of the United States Constitution. The case does not present a situation where there is a conflict among the various courts of appeals nor are there presented any of the other situations mentioned in Rule 19 of the Rules of this Court as affording a predicate for the granting of a writ of certiorari.

The Court of Appeals for the Seventh Circuit concluded correctly that had the present suit been reinstated in Tennessee on March 19, 1970, it would not have been barred by the Tennessee statutes of limitations. Both of the savings statutes would have permitted respondent an additional one year for the filing of her suit. Under Tennessee Code Annotated, Section 28-105 respondent would have been allowed to file suit within one year from the date of the return unserved of her original summons, October 28, 1968.

In other words under T.C.A. 28-105, a suit filed in Tennessee prior to October 28, 1969, would have been timely; the present suit was filed on March 19, 1969.

Likewise under T.C.A. 28-106 respondent would have had one year from the time of the dismissal of her suit upon petitioner's plea in abatement in the state court to refile her action. Dismissal in the state trial court occurred in February, 1969. This dismissal was not upon the merits, but simply upon the expiration of the agency of the Secretary of State under the Tennessee non-resident motorist statutes. Accordingly respondent would have had, at a minimum, one year from the date of the dismissal in the trial court within which to file a new action under T.C.A. 28-106. The present suit was filed within approximately one month of the dismissal in the state trial court, and was filed before the Tennessee Supreme Court had even affirmed the trial court.

Petitioner, through her counsel, has made every effort to avoid a trial of this case upon its merits. Every conceivable technicality has been interposed to try to prevent the assertion of respondent's claim. Respondent has never sought to do anything other than to obtain effective service of process upon the petitioner and to bring her case to trial. The Court of Appeals for the Seventh Circuit carefully construed the applicable Tennessee statutes, and construed them in conformity with the holdings of the Tennessee Supreme Court, discussed in the opinion below, to the effect that the savings statutes are to be liberally construed and are clearly applicable to cases such as the present. There simply can be no question but that had respondent refiled her suit in Tennessee, the suit would not have been barred. Under these circumstances it certainly is not barred under the Illinois "borrowing" statute. It was not refiled in Ten-

nessee, of course, for the simple reason that effective service of process could not be had there, but it was filed in a state where effective service could be had, and within the time limitations provided by the forum state.

With respect to the amendment of the complaint of respondent in the Court of Appeals, it should be stated that such amendment was permitted by the Court of Appeals without objection on the part of petitioner. The amendment simply set out the relevant facts concerning the previous Tennessee litigation, which had already been judicially noticed by the lower court and referred to by both parties in their briefs and by the lower court in its opinion. Certainly the Court of Appeals for the Seventh Circuit cannot be put in error by permitting an amendment to which petitioner did not object and which simply reflected matters of which the courts could properly take judicial notice in all events.

CONCLUSION

We submit that the petition for certiorari filed in this case is entirely without merit and presents no matters for appropriate consideration by this Court. The Court of Appeals for the Seventh Circuit has reached the correct result, has properly construed Tennessee statutes applicable to the case, and in no way has violated or offended any constitutional rights of the petitioner or failed in any way properly to observe either state or federal law applicable to the case. Rather, it is the petitioner who has sought and still seeks to deny respondent a trial of respondent's case on the merits in the state where the petitioner lives and where she is before the court by personal service of process.

The petition for certiorari should be denied.

Respectfully submitted,

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